United States Court of Appeals

for the Second Circuit

APPENDIX

75-2128

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
BARRY WARREN KIBBE,

Appellant,

-against-

ROBERT J. HENDERSON,
Superintendent,
Auburn Correctional Facility,

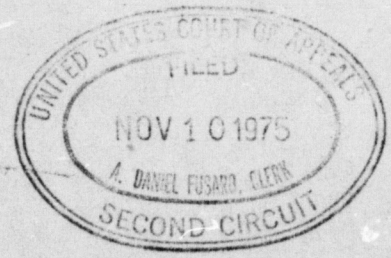
Appellee.

Docket No. 75-2128

B
P/S

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK



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PLAINTIFFS

UNITED STATES OF AMERICA, exrel. KIBBE, BARRY WARREN and KRALL, ROY A.

DEFENDANTS

HENDERSON, Superintendent, Auburn Correctional Facility

CAUSE Petitioner alleges that the trial court's charge to the jury was defective, etc.

75-CV- 314

ATTORNEYS

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75-CV-314

DATE 1975	NR.	PROCEEDINGS
ne 30	1	Filed Petition for Writ of Habeas Corpus, together with related papers
" 30	2	Filed State Court Brief
" 30	3	Filed Memorandum-Decision and Order of Judge Foley (6/27/75) denying and dismissing the petition for writ of habeas corpus and directing that the petition be filed without payment of fee.
" 30	4	Filed Judgment
ly 14	5	Filed Notice of Appeal
ly 14	6	Filed Memorandum-Decision and Order of Judge Foley (7/11/75) denying application for certificate of probable cause. Motion for leave to proceed in forma pauperis is granted to the limited extend of the notice of appeal
g. 18		Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
t. 16	7	Filed receipt for papers sent to C.C.A. 2nd Circuit

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* BARRY WARREN KIBBE, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ROY A. KRALL, Appellant.

Fourth Department, April 5, 1973.

Crimes — murder — defendants were properly convicted of murder of man, struck by automobile while he was in drunken condition after being robbed by defendants and left on remote highway — charge to jury, while lacking detail on causation, was sufficient.

1. Defendants were properly convicted of murder, among other crimes, in robbing a man in a helplessly drunken condition and leaving him on a remote highway where he was struck and killed by an automobile. Where the separate acts of both defendants and the motorist combined to produce the victim's death, defendants are responsible for the ultimate result, even though their acts alone might not have caused it.

2. Although the trial court's charge to the [illegible] causation of death lacked applicable detail, the charge, com[illegible]rith [illegible]guage of the statutes and the indictment, plus the evidence give[illegible]afficed to i[illegible]rm the jury, and therefore, reversal of the judgments is not required in the inte[illegible]st of justice.

APPEALS from judgments of the County Court of Monroe County (GEORGE D. OGDEN, J.), rendered November 30, 1971, upon verdicts convicting defendants of murder, robbery in the second degree, and grand larceny in the third degree.

Charles F. Crimi for Barry Warren Kibbe, appellant.

Nicholas P. Varlan (*Robert S. Beer* of counsel), for Roy A. Krall, appellant.

Jack B. Lazarus, District Attorney (*Edward J. Spires* of counsel), for respondent.

HENRY, J. Defendants robbed a helplessly drunken man and left him at the side of a highway where he was struck by an automobile and killed. They were convicted of the crimes of murder, second degree robbery and third degree grand larceny. They both voluntarily confessed to the crimes and the only serious question before us is whether the death was caused by their acts.

Appellants argue that although the evidence might support a finding that defendants evinced a depraved indifference to human life and that they engaged in conduct which created a grave risk of death to Stafford, his death was not caused thereby but was caused by Michael Blake in the operation of his automobile. In our opinion the evidence sufficiently shows that the death was caused by the acts of defendants as well as by the acts of Blake. "Where separate acts of negligence combine to produce directly a single injury each tort-feasor is responsible for the entire result, even though his act alone might not have caused it" (*Hill* v. *Edmonds*, 26 A D 2d 554, 555).

The acts of defendants which combined with the acts of Blake to cause Stafford's death consisted of leaving him in a helplessly drunken condition on the side of the road in an area of open fields where there were no nearby houses and where the road was bordered by snowbanks leaving no place but the roadway in which he could walk. It was apparent that to avoid death from exposure the only place in which he could walk to get help would be in the roadway, where in his condition there existed a grave risk that he would be killed by an automobile.

The court in charging the jury informed them of the applicable law and facts and the jury found each of them guilty.

While we agree with the dissenting Justice's statement that the trial court's charge respecting the cause of death was lacking in detail, we do not feel that a new trial should be granted. Appellants have not raised an [illegible]stion as to the sufficiency of the charge on these appeals [illegible]ir attorneys took no exception and made no request [illegible]g the cause of death at the trial.

In our opinion the charge together with language of the statutes and indictment and the evidence were sufficient to inform the jury on this subject and reversal of the judgments is not required in the interest of justice. (See *People* v. *Palmer*, 26 A D 2d 892, affd. 31 N Y 2d 1053.)

CARDAMONE, J. (dissenting). The defendants were properly convicted of robbery in the second degree and grand larceny in the third degree. However, I dissent and vote to reverse the murder conviction of both defendants in the interest of justice (CPL 470.15, subd. 3, par. [c]; subd. 6, par. [a]) because in my view the trial court's charge did not define and explain the issue of causation, nor was there sufficient explanation regarding the necessary mental state which the defendants must have been found to possess in order to sustain their conviction for that crime. The insufficiency of the charge deprived these defendants of their fundamental right to a fair trial insofar as these indictments charged them with murder under circumstances evincing " a depraved indifference to human life ", in that they " recklessly " engaged in conduct which created a grave risk of death to another person, and thereby caused the death of another person (Penal Law, § 125.25, subd. 2).

The salient facts on this indictment were that the defendants, Kibbe and Krall, had been drinking all during the afternoon and evening of December 30, 1970 in a bar with the victim Stafford. The bartender testified that the victim Stafford had been " flashing hundred dollar bills around " and the bartender told him to put them back in his pocket and " shut him off ", took his drink away from him and told Stafford " you had enough ". He further testified that Stafford asked for a ride to Canandaigua and left with the two defendants between 8:30 and 9:30 P.M. The two defendants took the victim to East River Road and after robbing him, left him on the road approximately one-quarter or one-half mile from the nearest gasoline station or habitation. It was clear and very cold with the wind blowing intermittently. It was not snowing at the time. Shortly after 10:00 P.M. a college senior proceeding north on the East River Road at about 50 miles per hour in a pickup truck saw a person

sitting in the road with his hands up in the air and ran over him with his truck. Stafford was dead on arrival at the hospital.

Each defendant has raised for our consideration the issue of whether his conduct caused the victim's death. The trial court's instruction on all the elements of the crimes charged occupies only about seven pages of the printed record and contains no direction on the issue of causation and touches on the issue of the defendants' culpable mental state merely by way of a statutory definition unaccompanied by explanation. The Criminal Procedure Law requires the Trial Judge to state the material legal principles applicable, and insofar as practical, to explain the application of the law to the facts in the case (CPL 300.10, subd. 2). As stated in *People* v. *Odell* (230 N. Y. 481, 488): "Jurors need not legal definitions merely. They require proper instructions as to the method of applying such definitions after reaching their conclusions on the facts." This court has repeatedly reiterated that the Trial Judge may not content himself with the mere reading of a statutory definition and statement of legal principles but must meaningfully relate them to the facts in the case. (*People* v. *Tisdale*, 18 A D 2d 274, 277; *People* v. *Lewis*, 13 A D 2d 714; *People* v. *Tunstall*, 5 A D 2d 338, 346; *People* v. *Kenda*, 3 A D 2d 80, 87; *People* v. *Birch*, 283 App. Div. 844.)

Ordinarily prosecution and conviction for murder under the former (old Penal Law, § 1044, subd. 2) and present (Penal Law, § 125.25) provisions of the Penal Law for "extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness" were, "for example, shooting into a crowd, placing a time bomb in a public place, or opening the door of the lions' cage in the zoo [citations omitted]" (Practice Commentary, Denzer and McQuillan, McKinney's Cons. Laws of N. Y., Book 39, Penal Law, p. 235). A recent Court of Appeals case sustaining a murder conviction under this statute involved the death of a three-and-a-half-year-old child caused by repeated physical beatings by defendant (*People* v. *Poplis*, 30 N Y 2d 85). In all of these cases the causation was direct and proximate. In the instant case, the jury, upon proper instruction, could have concluded that the victim's death by an automobile was a remote and intervening cause. There are no statutory provisions dealing with intervening causes — nor is civil case law relevant in this context. The issue of causation should have been submitted to the jury in order for it to decide whether it would be unjust to hold these appellants liable as murderers for the chain of events which actu-

ally occurred. Such an approach is suggested in the American Law Institute Model Penal Code (see Comment, § 2.03, pp. 133, 134 of Tentative Draft No. 4).

With respect to the defendants' culpable mental state, the jury would have to find that death by a vehicle was a "grave risk" created by defendants' reckless conduct. Under this statutory definition of murder there must be conduct which exhibits a depraved indifference to human life (Penal Law, § 125.25), "plus recklessness" (*People* v. *Poplis, supra,* p. 88). Subdivision 3 of section 15.05 of the Penal Law insofar as pertinent here defines the culpable mental state of "recklessly" as follows: "A person acts recklessly with respect to a result * * * when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur". It is not sufficient that the victim Stafford's death occurred by his being struck by a passing vehicle, but under the statute the jury must conclude that defendants were aware of and consciously disregarded this particular risk.

In order to sustain these particular murder convictions, the jury should have been fully and adequately charged so that its verdict could properly rest on either (1) a conclusion that defendants were responsible directly and proximately for the chain of events leading to Stafford's death; or (2) that their acts were perpetrated with a full consciousness of the probable consequences (*Darry* v. *People,* 10 N. Y. 120) which they consciously disregarded (Penal Law, § 15.05, subd. 3). The absence of an adequate charge on either of these issues requires a new trial in each case.

DEL VECCHIO, J. P., MARSH and MOULE, JJ., concur with HENRY J.; CARDAMONE, J., dissents in part and votes to reverse conviction for murder and grant a new trial thereon, in opinion.

Judgments affirmed.

Points of Counsel

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* BARRY WARREN KIBBE and ROY A. KRALL, Appellants.

Argued October 7, 1974; decided November 27, 1974.

Crimes — murder — supervening cause — defendants who abandoned robbery victim, partially undressed on dark road in subfreezing temperatures, are guilty of murder, despite fact that death resulted from victim being struck by truck, since defendants' actions were sufficiently direct cause of death and driver of truck committed no supervening wrongful act — Appellate Division decision not to reverse on ground of trial court's failure to give sufficiently detailed charge was exclusively within its discretion and not reviewable.

1. The defendants are guilty of murder, having abandoned their helplessly intoxicated robbery victim in subfreezing temperatures, without shoes or eyeglasses by the side of a dark road, one-half mile from the nearest structure, with his trousers at his ankles, his shirt pulled up and his outer clothing removed, despite the fact that death ultimately resulted from the victim being struck by a truck. The defendants' actions were a sufficiently direct cause of the victim's death to justify criminal liability. There is little doubt that the victim would have frozen to death had he remained on the shoulder of the road, and his only alternative was the highway, which in his condition clearly foreboded his death. Under the circumstances, that the driver of the truck which killed the victim had his low beam headlights on, that there was no artificial lighting on the highway, and that there was insufficient time for the driver to react, there was no supervening wrongful act to relieve the defendants from the directly foreseeable consequences of their actions.

2. While the trial court's charge regarding the cause of death might have been more detailed, the Appellate Division's decision not to reverse was exclusively within its discretion and may not be reviewed.

People v. *Kibbe*, 41 A D 2d 228, affirmed.

People v. *Krall*, 41 A D 2d 228, affirmed.

APPEALS, by permission of an Associate Judge of the Court of Appeals, from orders of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered April 5, 1973, which affirmed judgments of the Monroe County Court (GEORGE D. OGDEN, J.), rendered upon verdicts convicting defendants of murder, robbery in the second degree, and grand larceny in the third degree.

Michael R. Wolford for Barry Warren Kibbe, appellant. I. The trial court's charge to the jury was defective and constituted reversible error. (*People* v. *Best*, 253 App. Div. 491; *People* v. *Lupo*, 305 N. Y. 448; *People* v. *Brengard*, 265 N. Y. 100.) II. The evidence adduced at the trial was insufficient to

Points of Counsel

sustain the conviction of murder. (*People* v. *Brengard*, 265 N. Y. 100; *Darry* v. *People*, 10 N. Y. 120; *People* v. *Jernatowski*, 238 N. Y. 188; *People* v. *Poplis*, 30 N Y 2d 85.) III. The court erred in denying defendant's motions to suppress the one hundred dollar bill and items seized from defendant's vehicle. (*Davis* v. *Mississippi*, 394 U. S. 721; *Bumper* v. *North Carolina*, 391 U. S. 543; *Wong Sun* v. *United States*, 371 U. S. 471.) IV. The court abused its discretion in denying a serverence and a separate trial.

Betty D. Friedlander for Roy A. Krall, appellant. I. Where the risk that the victim Stafford would be killed by a negligent motorist as a result of appellant's act of leaving him by the side of the road was not significantly greater than the reasonable possibilities that a passing motorist would rescue or avoid him, appellant's conduct as a matter of law does not fall within the purview of subdivision 2 of section 125.25. (*Darry* v. *People*, 10 N. Y. 120; *People* v. *Rector*, 19 Wend. 569; *People* v. *White*, 22 Wend. 167; *People* v. *Trezza*, 125 N. Y. 740; *People* v. *Darragh*, 141 App. Div. 408; *People* v. *Jernatowski*, 238 N. Y. 188; *People* v. *Voelker*, 220 App. Div. 528; *People* v. *Poplis*, 30 N Y 2d 85; *People* v. *Eckert*, 2 N Y 2d 126.) II. The trial court's failure in its charge to explain to the jury the differences between murder and manslaughter in the second degree, its failure to mention the issue of causation at all, and its failure to instruct the jury to consider the issue of intoxication in relationship to the murder charge, even after the jury requested additional instructions, combined to make it impossible for the jury to assess the guilt or innocence of appellant fairly and intelligently according to the evidence and the law. A reversal of appellant's conviction is required because the inadequacy of the charge resulted in a denial of a fair trial. (*People* v. *Miller*, 6 N Y 2d 152; *People* v. *Odell*, 230 N. Y. 481; *People* v. *Conigliaro*, 20 A D 2d 930, *People* v. *Gonzalez*, 293 N. Y. 259; *People* v. *Lupo*, 305 N. Y. 448; *People* v. *Gezzo*, 307 N. Y. 385; *People* v. *Tisdale*, 18 A D 2d 274; *Bruton* v. *United States*, 391 U. S. 123.) III. Prejudice created by codefendant Kibbe's unredacted pretrial statements that were read into the trial record required granting of appellant's motion for a separate trial when Kibbe did not testify at trial. (*Bruton* v. *United States*, 391 U. S. 123;

Opinion per GABRIELLI, J.

People v. *Anthony*, 24 N Y 2d 696; *People* v. *Stanbridge*, 26 N Y 2d 1; *Dutton* v. *Evans*, 400 U. S. 74; *People* v. *Snyder*, 246 N. Y. 491; *People* v. *Fisher*, 249 N. Y. 419; *People* v. *Feolo*, 282 N. Y. 276; *People* v. *La Bella*, 28 N Y 2d 405.) IV. Items obtained from codefendant Kibbe's car without a warrant or consent should have been suppressed when no probable cause, exigent circumstances, or arrest existed to justify a search and an unauthorized entry into the car was necessary to observe the items seized. (*People* v. *Brosnan*, 32 N Y 2d 254; *Chambers* v. *Maroney*, 399 U. S. 42; *Carroll* v. *United States*, 267 U. S. 132; *People* v. *Lewis*, 26 N Y 2d 547; *People* v. *Brown*, 28 N Y 2d 282; *People* v. *O'Neill*, 11 N Y 2d 148; *Coolidge* v. *New Hampshire*, 403 U. S. 443.)

Jack B. Lazarus, District Attorney (*Raymond E. Cornelius* of counsel), for respondent. I. Appellants were properly convicted of murder under subdivision 2 of section 125.25 of the Penal Law. (*Hill* v. *Edmonds*, 26 A D 2d 554; *Darry* v. *People*, 10 N. Y. 120; *People* v. *Poplis*, 30 N Y 2d 85; *People* v. *Darragh*, 141 App. Div. 408; *People* v. *Jernatowski*, 238 N. Y. 188; *People* v. *Kane*, 213 N. Y. 260; *Cox* v. *People*, 80 N. Y. 500; *People* v. *Brengard*, 265 N. Y. 100.) II. The trial court's charge to the jury did not constitute reversible error. (*People* v. *Palmer*, 26 A D 2d 892; *People* v. *D'Argencour*, 95 N. Y. 624.) III. The seizure of the one hundred dollar bill and the search and seizure of Kibbe's automobile was proper. (*People* v. *Whitehurst*, 25 N Y 2d 389; *People* v. *Brown*, 28 N Y 2d 282; *Chambers* v. *Maroney*, 399 U. S. 42; *People* v. *Brosnan*, 32 N Y 2d 254.) IV. The trial court properly denied motions for a separate trial. (*People* v. *Baker*, 26 N Y 2d 169; *People* v. *Anthony*, 24 N Y 2d 696; *Nelson* v. *O'Neil*, 402 U. S. 622; *People* v. *McNeil*, 24 N Y 2d 550; *People* v. *Burwell*, 26 N Y 2d 331.)

GABRIELLI, J. Subdivision 2 of section 125.25 of the Penal Law provides, in pertinent part, that " [a] person is guilty of murder " when " [u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person ".

The factual setting of the bizarre events of a cold winter night of December 30, 1970, as developed by the testimony,

including the voluntary statements of the defendants, reveal the following: During the early evening the defendants were drinking in a Rochester tavern along with the victim, George Stafford. The bartender testified that Stafford was displaying and "flashing" one hundred dollar bills, was thoroughly intoxicated and was finally "shut off" because of his inebriated condition. At some time between 8:15 and 8:30 P.M., Stafford inquired if someone would give him a ride to Canandaigua, New York, and the defendants, who, according to their statements, had already decided to steal Stafford's money, agreed to drive him there in Kibbe's automobile. The three men left the bar and proceeded to another bar where Stafford was denied service due to his condition. The defendants and Stafford then walked across the street to a third bar where they were served, and each had another drink or two.

After they left the third bar, the three men entered Kibbe's automobile and began the trip toward Canandaigua. Krall drove the car while Kibbe demanded that Stafford turn over any money he had. In the course of an exchange, Kibbe slapped Stafford several times, took his money, then compelled him to lower his trousers and to take off his shoes to be certain that Stafford had given up all his money; and when they were satisfied that Stafford had no more money on his person, the defendants forced Stafford to exit the Kibbe vehicle.

As he was thrust from the car, Stafford fell onto the shoulder of the rural two-lane highway on which they had been traveling. His trousers were still down around his ankles, his shirt was rolled up towards his chest, he was shoeless and he had also been stripped of any outer clothing. Before the defendants pulled away, Kibbe placed Stafford's shoes and jacket on the shoulder of the highway. Although Stafford's eyeglasses were in the Kibbe vehicle, the defendants, either through inadvertence or perhaps by specific design, did not give them to Stafford before they drove away. It was sometime between 9:30 and 9:40 P.M. when Kibbe and Krall abandoned Stafford on the side of the road. The temperature was near zero, and, although it was not snowing at the time, visibility was occasionally obscured by heavy winds which intermittently blew previously fallen snow into the air and across the highway; and there was snow on both sides of the road as a result of previous

plowing operations. The structure nearest the point where Stafford was forced from the defendants' car was a gasoline service station situated nearly one half of a mile away on the other side of the highway. There was no artificial illumination on this segment of the rural highway.

At approximately 10:00 P.M. Michael W. Blake, a college student, was operating his pickup truck in the northbound lane of the highway in question. Two cars, which were approaching from the opposite direction, flashed their headlights at Blake's vehicle. Immediately after he had passed the second car, Blake saw Stafford sitting in the road in the middle of the northbound lane with his hands up in the air. Blake stated that he was operating his truck at a speed of approximately 50 miles per hour, and that he "didn't have time to react" before his vehicle struck Stafford. After he brought his truck to a stop and returned to try to be of assistance to Stafford, Blake observed that the man's trousers were down around his ankles and his shirt was pulled up around his chest. A Deputy Sheriff called to the accident scene also confirmed the fact that the victim's trousers were around his ankles, and that Stafford was wearing no shoes or jacket.

At the trial, the Medical Examiner of Monroe County testified that death had occurred fairly rapidly from massive head injuries. In addition, he found proof of a high degree of intoxication with a .25% by weight, of alcohol concentration in the blood.

For their acts, the defendants were convicted of murder, robbery in the second degree and grand larceny in the third degree. However, the defendants basically challenge only their convictions of murder, claiming that the People failed to establish beyond a reasonable doubt that their acts "caused the death of another", as required by the statute (Penal Law, § 125.25, subd. 2). As framed by the Appellate Division (41 A D 2d 228) the only serious question raised by these appeals "is whether the death was caused by [the defendants'] acts" (p. 229). In answering this question, we are required to determine whether the defendants may be convicted of murder for the occurrences which have been described. They contend that the actions of Blake, the driver of the pickup truck, constituted both an intervening and superseding cause which relieves them

of criminal responsibility for Stafford's death. There is, of course, no statutory provision regarding the effect of an intervening cause of injury as it relates to the criminal responsibility of one who sets in motion the machinery which ultimately results in the victim's death; and there is surprisingly little case law dealing with the subject. Moreover, analogies to causation in civil cases are neither controlling nor dispositive, since, as this court has previously stated: " A distance separates the negligence which renders one criminally liable from that which establishes civil liability " (*People* v. *Rosenheimer*, 209 N. Y. 115, 123); and this is due in large measure to the fact that the standard or measure of persuasion by which the prosecution must convince the trier of all the essential elements of the crime charged, is beyond a reasonable doubt (*In re Winship*, 397 U. S. 358, 361). Thus, actions which may serve as a predicate for civil liability may not be sufficient to constitute a basis for the imposition of criminal sanctions because of the different purposes of these two branches of law. Stated another way, the defendants should not be found guilty unless their conduct " was a cause of death sufficiently direct as to meet the requirements of the *criminal*, and not the *tort*, law." (*Commonwealth* v. *Root*, 403 Pa. 571, 575; see, also, *People* v. *Scott*, 29 Mich. App. 549.) However, to be a sufficiently direct cause of death so as to warrant the imposition of a criminal penalty therefor, it is not necessary that the ultimate harm be intended by the actor. It will suffice if it can be said beyond a reasonable doubt, as indeed it can be here said, that the ultimate harm is something which should have been foreseen as being reasonably related to the acts of the accused. (1 Wharton, Criminal Law Procedure, § 169.)

In *People* v. *Kane* (213 N. Y. 260), the defendant inflicted two serious pistol shot wounds on the body of a pregnant woman. The wounds caused a miscarriage; the miscarriage caused septic peritonitis, and the septic peritonitis, thus induced, caused the woman's death on the third day after she was shot. Over the defendant's insistence that there was no causal connection between the wounds and the death and, in fact, that the death was due to the intervention of an outside agency, namely, the negligent and improper medical treatment at the hospital, this court affirmed the conviction " even though the

medical treatment may also have had some causative influence " (p. 277).

We subscribe to the requirement that the defendants' actions must be *a sufficiently direct cause* of the ensuing death before there can be any imposition of criminal liability, and recognize, of course, that this standard is greater than that required to serve as a basis for tort liability. Applying these criteria to the defendants' actions, we conclude that their activities on the evening of December 30, 1970 were a sufficiently direct cause of the death of George Stafford so as to warrant the imposition of criminal sanctions. In engaging in what may properly be described as a despicable course of action, Kibbe and Krall left a helplessly intoxicated man without his eyeglasses in a position from which, because of these attending circumstances, he could not extricate himself and whose condition was such that he could not even protect himself from the elements. The defendants do not dispute the fact that their conduct evinced a depraved indifference to human life which created a grave risk of death, but rather they argue that it was just as likely that Stafford would be miraculously rescued by a good samaritan. We cannot accept such an argument. There can be little doubt but that Stafford would have frozen to death in his state of undress had he remained on the shoulder of the road. The only alternative left to him was the highway, which in his condition, for one reason or another, clearly foreboded the probability of his resulting death.

Under the conditions surrounding Blake's operation of his truck (i.e., the fact that he had his low beams on as the two cars approached; that there was no artificial lighting on the highway; and that there was insufficient time in which to react to Stafford's presence in his lane), we do not think it may be said that any supervening wrongful act occurred to relieve the defendants from the directly foreseeable consequences of their actions. In short, we will not disturb the jury's determination that the prosecution proved beyond a reasonable doubt that their actions came clearly within the statute (Penal Law, § 125.25, subd. 2) and " cause[d] the death of another person ".

We also reject the defendants' present claim of error regarding the trial court's charge. Neither of the defendants took exception or made any request with respect to the charge regard-

ing the cause of death. While the charge might have been more detailed, appellants' contention that the Appellate Division should have reversed for its claimed inadequacy in the interests of justice (CPL 470.15, subd. 3, par. [c]; subd. 6, par. [a]) may not be here reviewed, for the intermediate appellate court's refusal to so reverse was exclusively within its discretion (*People* v. *D'Argencour*, 95 N. Y. 624; *People* v. *Calabur*, 178 N. Y. 463; see, also, Cohen and Karger, Powers of the New York Court of Appeals, § 155).

The orders of the Appellate Division should be affirmed.

Chief Judge BREITEL and Judges JASEN, JONES, WACHTLER, RABIN and STEVENS concur.

Orders affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.
BARRY WARREN KIBBE and ROY A. KRALL,

Relators,

-against -

75-CV- 75-CV-311

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Petitioner Kibbe in this habeas corpus proceeding with a title joining Krall who was convicted and sentenced with him is an inmate of Auburn Correctional Facility. After a jury trial in Monroe County Court, petitioner was convicted of Murder in violation of N.Y. Penal Law, § 125.25, subd. 2; Robbery in the second degree; and Grand Larceny in the third degree. Under judgments of conviction entered November 30, 1971, petitioner was sentenced to concurrent terms of 15 years to life on the Murder conviction; 5 to 15 years on the Robbery conviction; and an indeterminate term up to 4 years on the Grand Larceny one. The conviction was affirmed on appeal, opinions being written both by the Appellate Division (41 A.D.2d 228, 4th Dept. 1973), and the Court of Appeals (35 N.Y. 2d 407, 1974). Petitioner's brief in support of this petition is practically verbatim from his brief filed in the Court of Appeals, as indicated by the points of counsel found in the official New York Court of Appeals report at pp. 407-408, and compared with the brief filed in this federal court, beginning on p. 10.

The facts are set forth in detail by Judge Gabrielli in his opinion for the Court of Appeals, but shall be summarized again. Petitioner and a codefendant agreed to take the victim from a bar in Rochester to Canandaigua on a cold night in December 1970. The

victim was very intoxicated. Petitioner and his codefendant partially undressed the victim, George Stafford, stole his money and then left him on the side of a lonely country road. A driver of a truck later that night saw the victim sitting in the north-bound lane with his hands up in the air and could not stop the truck in time and ran Stafford down causing his death. Judge Gabrielli (p. 411) stated that the basic challenge in the New York Court of Appeals was to the murder conviction questioning whether the acts of defendants "caused the death of another" as required by statute.

Petitioner's first point is that the trial court's charge to the jury was defective, in that it failed to include an instruction on the element of causation and on petitioner's mental state. Both State appellate opinions reviewing the conviction discussed this point carefully. Both noted there were no exception or requests to charge on the cause of death issue by defense counsel. The correctness of a charge fails to raise a question of federal constitutional dimensions. United States ex rel. Mintzer v. Dros, 403 F.2d 42 (2d Cir. 1967). Where there is no showing that alleged errors in the charge were such as to deprive defendant of a federal constitutional right, the charge is not reviewable in a federal habeas corpus proceeding. Cupp v. Naughten, 414 U.S. 141 (1973).

The second point urged by petitioner is that the evidence at the trial was insufficient to sustain the conviction for murder. Federal habeas corpus it is settled may not be used to test the sufficiency of the evidence. United States ex rel. Morton v. Mancusi, 393 F.2d 482 (2d Cir. 1968); cert. denied, 393 U.S. 927 (1968); United States ex rel. Sadowy v. Fay, 284 F.2d 426 (2d Cir. 1960).

The third point is that the court erred in denying petitioner's motions to suppress evidence (a $100 bill) and items seized from petitioner's vehicle. Errors in the admission or exclusion of

evidence at a state trial form no basis for habeas corpus relief unless there is evident deprivation of a fundamentally fair trial and that has not been shown here. United States ex rel. Green v. McMann, 268 F. Supp. 529 (S.D.N.Y. 1967); United States ex rel. Santiago v. Follette, 298 F. Supp. 973 (S.D.N.Y. 1969). There is nothing offered of substance to indicate that there was not sufficient support for the State Court rulings that the $100 bill and items seized from the vehicle were other than voluntarily given or taken with consent and not illegally.

The trial court's refusal to grant petitioner a trial separate from his codefendant is within the court's discretion. There was no violation of the Bruton rule that could be considered prejudicial because petitioner's codefendant Krall testified at the joint trial. Bruton v. United States, 391 U.S. 123 (1968). It is not claimed the statements or confessions were not substantially the same or inconsistent. See United States ex rel. Duff v. Zelker, 452 F.2d 1009 (2d Cir. 1971), cert. denied, 406 U.S. 932 (1972); United States ex rel. Ortiz v. Fritz, 476 F.2d 37 (2d Cir. 1973).

The final point is entitled: "The Court erred in not suppressing all or some of the petitioner's statements either as a product of a primary illegality or as not being made after proper advice or after a valid waiver." Point V, pp. 29-30, of petitioner's application casts doubt upon any contention that the principles of Miranda v. Arizona, 384 U.S. 436 (1966), were violated. There was a waiver form involved and also oral warnings. Words which convey the substance of the Miranda warning are sufficient. United States v. Vanterpool, 394 F.2d 697, 698-99 (2d Cir. 1968). United States v. Lamia, 429 F.2d 373, 376-77 (2d Cir. 1970), cert. denied, 400 U.S. 907. Further, Judge Gabrielli in his opinion and Appellate Division Justice Henry stated flatly the statements of the petitioner and his codefendant were voluntary.

From my review of the state opinions and record furnished me, plaintiff fails in this respect to establish by convincing evidence that the factual determination of voluntariness made in the State courts is erroneous. LaVallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Allen v. LaVallee, 411 F.2d 241, 244 (2d Cir. 1969). There is no showing of circumstances of the type that do give concern, such as prolonged questioning, physical abuse, lack of food or water, that might warrant finding the admissions and confessions were involuntary. There was adequate hearing under People v. Huntley, 15 N.Y. 2d 72 (1965), and there is no evident reason why the presumption of correctness should not apply. 28 U.S.C. 2254(d); United States ex rel. Rivera v. Follette, 395 F.2d 450 (2d Cir. 1968); United States ex rel. Coleman v. Mancusi, 423 F.2d 985 (2d Cir. 1970).

In my judgment the State trial and appellate determinations were fairly and carefully made and I am content to accept them. The petition shall be filed without payment of fee and is denied and dismissed for the foregoing reasons.

It is so Ordered.

Dated: June 27, 1975

Albany, New York

James T. Foley

UNITED STATES DISTRICT JUDGE

Trial Court's Charge to the Jury

THE COURT: Members of the jury, a grand jury of the County of Monroe has indicted these two defendants by an indictment reading as follows: "The People of the State of New York against Roy A. Krall and Barry Warren Kibbe. First count: The grand jury of the County of Monroe by this indictment accuse the defendants Roy A. Krall and Barry Warren Kibbe of the crime of murder in violation of Sections 20.00 and 125.5, sub. 2 of the Penal Law of the State of New York,

committed as follows: The defendants on or about December 30th, 1970 in the County of Monroe, State of New York, feloneously and under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct which created a grave risk of death to another person, to wit, George Stafford, and thereby caused death. Second count: The grand jury of the County of Monroe by this indictment accuse the defendants of the crime of robbery in the first degree in violation of Section 20.00 and 160.15, sub. 1 of the Penal Law of the State of New York committed as follows: The defendants at the same time and place set forth in the first count of the indictment feloneously and forceably stole property, to wit, a sum of United States currency and other personal property from George Stafford, and when in the course of the commission of the crime or the immediate flight therefrom, the defendants seriously endangered George Stafford who was not a participant in the

crime. Third count: The grand jury of the County of Monroe by this indictment further accuse the defendants of the crime of robbery in the second degree in violation of Sections 20.00 and 160.10 sub. 1 of the Penal Law of the State of New York committed as follows: The defendants at the same time and place set forth in the first count of this indictment feloneously and forceably stole property, to wit, a sum of United States currency and other personal property from George Stafford, and when each defendant was being aided by another person, to wit, the other defendant who was actually present. Fcurt count: And the grand jury of the County of Monroe by this indictment further accuse the defendants of the crime of grand larceny in the third degree in violation of Section 20.00 and 150.30, sub. 5 of the Penal Law of the State of New York committed as follows: The defendants at the same time and place set forth in the first count of this indictment feloneously stole property, to wit, a

sum of United States currency and other personal property from the person of George Stafford."

The indictment is no proof or evidence whatever of the guilt of these defendants or either of them of the crime or crimes charged. It must not be used by you as any proof of their guilt whatever. Your verdict, whether it be guilty or not guilty is dependant and must follow only the evidence produced here in this courtroom by the witnesses who have appeared before you. When I refer to evidence, I mean oral as well as written exhibits received in evidence are included as a part of the evidence.

This indictment is rather an accusation of wrongdoing on the part of a named person. That accusation is made by a body of the citizens of the County of Monroe and is no proof whatever of the guilt of these defendants or either of them of the crime or crimes charged.

In that connection, members of the jury,

I point out to you, and I ask you to consider the evidence in this light, any statement made, if you find it was a true statement in accordance with the rules of law which I will afterwards give to you, and a voluntary statement can be used as evidence only, and I repeat, only, against the person making that statement and not against the co-defendant or any other person. If A says B did this, that or the other thing in A's statement, that statement and whatever its contents are cannot in any fashion be used against B. It's only what A says that he did that you may consider and then only as against A. In other words, whatever is contained in a statement of either of these defendants if believed and if given freely and voluntarily can be used as evidence only against the person the defendant making the statement and not against his co-defendant.

Before I get further into the charge I think it proper to compliment all of the attorneys upon not only the way in which

they have handled the introduction of evidence, examination and cross-examination and in their summaries, the arguments they have made to you why you should find or believe a certain way, but in their conduct of the case. I believe, and it is my opinion that that conduct of all these attorneys, all three of them has been not only gentlemanly, it has been thorough and in every way they have protected zelously the rights of their respective clients.

These defendants appear before you presumed to be innocent. They do not have to offer any evidence tending to prove or disprove their innocence. They don't have to do anything. They are presumed to be innocent and that presumption of innocence surrounds and protects them throughout the trial and until you, by your verdict, if such be your verdict, have found one of them or either of them otherwise. The burden of proving the defendants or each of them guilty of each or any of the crimes

charged beyond a reasonable doubt is always upon the People of the State of New York represented by the District Attorney. The People must prove each defendant guilty beyond a reasonable doubt before you, by your verdict, can find him guilty.

In this case, each of the two defendants is accused of four separate crimes. In your deliberations and the verdict that you will return, separate the defendants and consider each one as a separate case and as to each defendant consider whether he is guilty or not guilty of each of the charges for which he has been indicted. That is, each defendant will be found guilty or not guilty of each of the four accused crimes.

A reasonable doubt is not a mere whim nor a mere guess nor a mere surmise nor is it a subterfuge to which resort may be had by a juror to avoid doing an unpleasant and disagreeable duty. The words beyond a reasonable doubt do not mean that the

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a reasonable examination.

If all the reasonable evidence in this case does not convince you as to the guilt of each of the defendants of the crime or crimes charged and if, at the end of your deliberations, there is still left in your minds a lack of certainty, a doubt based upon the evidence or lack of evidence in this case for which doubt you could give a sound reason if called upon to do so as to the guilt of the defendant of the crime charged, then, and in that event you should give to the defendant the benefit of that reasonable doubt and therefore find him not guilty.

Credible testimony is simply that testimony which you find to be true, believable which has the ring of sincerity, probability about it. It is the kind of testimony which would cause you to take action in a matter of like importance effecting yourselves. From all of the testimony received here use your own good judgment and determine what you believe; that is credible

testimony.

Dr. Edland was called as a witness to testify as to the death and the cause of death of George Stafford. He is what we classify as an expert witness. His testimony is that of an expert and is received from him, who by reason of training, experience and study, has been shown qualified to express an opinion on subject which we laymen are not usually familiar. Such testimony, except whereas to a present or past fact is opinion testimony. And considering opinion testimony and the weight to be given to it, consider the qualifications such as study, training, and experience of the witness expressing the opinion in his opportunity for observation and a similation of the facts upon which his opinion is based.

You are the sole judges of the facts. In reaching your conclusions as to what facts have been proven beyond a reasonable doubt you will use your own recollection, not that of either counsel or of myself.

I call to your attention that if you cannot remember what the testimony was or if there is any kind of a dispute about what the testimony was you are at liberty to ask the Reporter to read that testimony to you.

You are also the sole judges of the credibility of the witnesses. In reaching a conclusion as to what weight you will give to the testimony of any witness you may take into consideration his demanor, his manner of testifying, his relationship to the case or the parties, the motive, if any, the witness may have for testifying truthfully or falsely and the probability of the story told by the witness. You may call to your aid the knowledge you have acquired in your every day life in sizing up people and in deciding whether or not they are telling the truth. If you find that any witness has wilfully testified falsely as to any material fact, you may disregard the entire testimony of that witness. You

may, if you wish, give credence to so much of his testimony as you find corroborated or substantiated by other credible testimony.

During the course of the trial it was necessary that I make some rulings upon objections or upon the admission or exclusion or striking of testimony from the record. Disregard those rulings in their entirety. Do not use them to the prejudice of any party to this lawsuit. You will follow, however, the rulings whereby certain testimony was striken from the record and you are instructed to disregard it. Follow those rulings consciously.

The arguments of counsel are advanced for your help in reaching a fair and just verdict. Where the arguments are based upon any evidence received in this lawsuit, not necessarily evidence that you find to be credible or upon inference reasonable to be drawn from that evidence, those arguments you may follow. If the arguments are not based upon any testimony received in this

lawsuit or upon inference reasonable to be drawn from that testimony, disregard them in their entirety.

If, in the course of your deliberations, the question of punishment or possible punishment attended upon a verdict of guilty should arise, I charge you, members of the jury, punishment or possible punishment is no part and must be no part of your deliberations. That follows logically. You are to decide what the true facts are. You are to apply to them the law which the Court has given to you and upon both the facts and that law decide whether the People have met their burden of proof. Decide whether the defendant, each of the defendants is guilty or not guilty of each of the crimes charged. If, and only if your verdict against either defendant on any charge be one of guilty, then the Court and the Court alone has the duty and responsibility of imposing punishment. So, punishment is no part of and can be no part of your deliberations.

These crimes or the crimes charged all require an intent on the part of the perpetrator to consummate the respective crimes. Intent is a frame of mind of a defendant at the time he commits the act. Murder. Robbery. Larceny. You may wonder how you are to determine what a man's intent is? You can only determine that by his acts and conduct; by what he does and by what he says. Sometimes, as you are well aware, acts speak louder than words. Ordinarily, a person intends the natural consequences of his act. It is for you to determine the defendants' intent, if any, from all of the evidence in this case. In that connection, you may consider what each defendant did; what means he employed; the surrounding circumstances; the condition of the people involved; the time of day or night; his manner of clothing and anything of that nature received here in evidence surrounding the transactions set forth during the course of this trial. That intent is an essential element of the crimes of which

each of these defendants is charged.

Some of the facts, and I'm not going to detail them, they have been adequately and fully covered by counsel in their summations, and by the evidence itself, but circumstantial evidence has been offered to prove some of the facts. Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. Circumstantial evidence is the proof of collateral facts and differs from direct and positive proofs in that it never proves directly the fact in question. In other words, direct or positive evidence as the term is commonly used, means statements by witnesses, directly probative of one or more of the principals or res gestae facts of the case while circumstantial evidence puts before you facts which alone or with others are in some degree, but indirectly probative of one or more of those principles or res gestae facts and from which one or more of those principle facts

may properly be inferred. Circumstantial evidence means proof by circumstances surrounding the transaction. In a given case there is furnished direct proof of certain facts and circumstances from which you may infer other connected facts which usually and reasonably follow according to the common experience of mankind. The inference may not be based upon conjecture, supposition, suggestion, speculation or upon another inference. The facts from which the inference are to be drawn must be established by direct proof. If you can infer from the proven facts a conclusion that is as consistent with innocence as with guilt, such evidence may not be used as proof of guilt or, by its very nature, it does not meet the requirement of proof of guilt beyond a reasonable doubt. When there are two inferences which can be drawn from circumstantial evidence, one leading logically to the conclusion of guilt, and the other leading logically to the conclusion of

innocence, then the circumstantial evidence has no weight or value and it is your duty to ignore it. In determining whether a fact has been proven by circumstantial evidence there are two general rules to be observed. One, the hypothesis or inference of delinquency or guilt should flow naturally from the facts proved and be consistent with them all. Two, the evidence must be such as to exclude a moral certainty every hypothesis or inference but that of the guilt of the defendant of the offense inpuded to him. Or, in other words, the facts proved must all be consistent with and point not only to his guilt but they must be inconsistent with his innocence.

Section 60.45 of the Criminal Procedure Law reads as follows: "Evidence of a written or oral confession, admission or other statement made by a defendant with respect to his participation or lack of participation in the offense charged may not be received in evidence against him in a criminal pro-

ceeding if such statement was involuntarily made. A confession, admission or other statement is involuntarily made by a defendant when it is obtained from him, (a) By any person, by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of underlying his ability to make a choice whether or not to make a statement or (b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him; (1) By means of any promise or statement of fact which promise or statement creates a substantial risk that the defendant might falsely incriminate himself or (2) In violation of such rights as the defendant may derive from the constitution of the state or of the United States."

Section 60.50 of the same law reads as

follows: "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed."

In this case, members of the jury, if you find that the statement, admission or confession of the defendant was voluntarily made, was a free expression of his will in accordance with the rules which I'm about to give to you, you must also, before you can convict that defendant of any of these crimes, find some additional evidence that the offense charged has been committed. Now, in this case, as far as the robbery is concerned, just to point to one piece of the evidence that has been offered, one of these defendants showed a hundred dollar bill in a bar after the alleged offense. That may be some evidence that the offense occurred and that the hundred dollar bill was taken from the victim of the robbery. I just use that by way of illustration of what I mean by

some additional evidence that the offense charged has been committed. Naturally, there are other bits, pieces of evidence, and I do not pretend to detail them all. When I say there are, there have been received in evidence additional facts from which you may find that the offense charged has been committed.

In addition to the confession or the statement or the admission, there is proof of circumstances which although they may have an innocent construction are nevertheless calculated to suggest a commission of crime, and for the explanation of which the confession furnishes a key, the statute is complied with. It is not necessarily that such additional evidence should be sufficient to convict a defendant indepent of the confession or statement. The question is whether there is any evidence in addition to the confession or statement reasonably tending to prove the crime and thus coroborate the confession.

Now, referring to the confession or statement or admission by whatever name it's called itself, I charge you as follows: If you determine that it was a confession, the statement or admission offered here, and this refers to each of the statements, and if you determine that the defendant made it, that is, the respected defendant made the statement attributed to him, and if you determine that it is true, if you determine that it is accurate, before you may use it you must find that it is voluntary and the prosecution has the burden of proving that it was a voluntary confession. The defendant merely comes forward with the suggestion that it was involuntary or he may not offer any proof at all, that is his privilege. But the burden is upon the prosecution to show that it was voluntary. A confession, even if true and accurate, if involuntary may not be used. If you say it was involuntarily obtained it goes out of the case. If you find it was voluntarily made, the weight of it is

for you to determine. I am submittin
you as a question of fact to determi
whether or not (a) This statement w
by the defendant, the respective defe
(b) Whether it was a voluntary state
a confession. And (c) Whether if vo
it was true and accurate. That decis
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it. If you should decide that it is
voluntary, exclude it from the case a
not consider it at all. In that even
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was a true confession, then if you al

that it was gotten by influence or fear produced by threats or that it was coerced in any fashion, mentally or physically, reject it. I repeat to you: The burden of proving beyond a reasonable doubt the accuracy, truth and the voluntariness of the confession always rests upon the prosecution.

There has been some reference to intoxication, and I charge you, members of the jury, intoxication is the state or condition which inevitably follows from taking excessive quantities of an intoxicant. Intoxication implies undue or abnormal exitation of the pasions, or feelings or the impairment of the capacity to think and act correctly and efficiently. It suggests the loss of the normal control of one's feelings. The intoxication need not be to the extent of depriving the accused of all power of volition or of all inability to form an intent.

I think from the evidence that you may find it proper to consider intoxication both as to each of these defendants. Each of whom

in the statement, if you find that can be used in evidence, said that he had been drinking quite a while before the three of them, Stafford, Krall and Kibbe left Nick and Corky's bar. And also, in connection with the Defendant Krall's testimony that he had 10 or 12 drinks of intoxicants the day that he is alleged to have made a statement to the Sheriff's representatives. I think it is proper for you to also consider the question of intoxication in connection with the condition of the deceased George Stafford only as one of the factors, mind you.

There is also another rule of law that the exclusive possession of the fruits of a crime, if unexplained or falsely explained justifies the inference of guilt. This rule is applicable to all kinds. In that connection, I call to your attention the testimony that one of these defendants, after the alleged crime exhibited or displayed a one hundred dollar bill in a bar. I believe there was some testimony in the statement of the

other that he had produced -- was there or was there not?

MR. CORNELIUS: Yes.

THE COURT: That he produced a one hundred dollar bill in the Sheriff's Office. They are relevant or that testimony may be relevant only because of the other testimony from the witness Herbert Stern that the deceased George Stafford on the day in question, December 30th, 1970 had been at his law office and by way of a retainer had paid Mr. Stern two, one hundred dollar bills. That upon a change of mind Mr. Stern returned the same bills to Mr. Stafford, two, one hundred dollar bills. They were returned some time around noon or the early afternoon of the day in question.

I have already pointed out to you that if you find these alleged statements or confessions voluntary and true and accurate, if you see fit in accordance with a law which I have given to you to use them at all, they can only be used against the

defendant making the particular statement. The statement of one defendant cannot be used against the other in any way whatever. It is no evidence against the co-defendant.

In connection with the crimes charged I define certain phrases or words to you as follows: Section 20.00, sub. 10 of the Penal Law defines serious physical injury as follows: "Serious physical injury means physical injury which creates a substantial risk of death or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."

Recklessly has been defined in Section 15.00 of the same law as follows: "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists.

The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation, a person who creates such a risk that is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

Section 15.25 of the same law reads as follows: "Intoxication is not as such a defense to a criminal charge but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged."

"Feloneously means unlawful, illegally with criminal intent."

"Knowingly means with knowledge, consciously, intelligently, wilfully, intentionally."

"Immeadiate means present, at once, without delay, not deferred by any in value of time." I give you that definition in

connection with the phrase immediate flight. Consider whether the flight of this defendant or each of them was immediate.

"Depraved has been defined as to Exhibit contempt for." A depraved mind has been defined as "An inherent deficiency of moral sense and reptitude." It is also defined as a "Highest grade of malice."

"Grave is serious. The opposite of trivial or inconsequential."

Indifferent has been defined as, "Disinterested, without care or consideration for the consequences of the act."

In this case, members of the jury, before either of these defendants can be convicted of any of the crimes charged, all of the elements of that crime must be proven beyond a reasonable doubt.

Homicide is defined in Section 125.00 of the Penal Law as follows: "Homicide means, conduct which causes the death of a person under circumstances constitution murder, manslaughter first degree, or manslaughter

in the second degree." Under the first count of this indictment each of these defendants is charged with murder. Section 125.25 of the Penal Law reads as follows: "A person is guilty of murder when, (2) under circumstances evincing a depraved indifference to human life he recklessly engages in conduct which creates a grave risk of death to another person. And thereby causes the death of another person. I think I defined to you the different words used in that section.

The indifference to human life is the indifference to the life of George Stafford. And not to the life of the public in general. It's indifference to the human life of George Stafford. You will note that section requires proof of recklessly engaging in conduct, because the section refers to reckless acts on the part of the defendant and only for that reason, I charge you manslaughter in the second degree and manslaughter in the first degree. You will not consider either

of these crimes unless you feel that these defendants or either of them, was guilty of causing the death of George Stafford recklessly. But, they do not come withint the provision of 125.25, sub. 2.

Manslaughter in the first degree is defined in Section 125.20 as follows: "A person is guilty of manslaughter in the first degree when with intent to cause serious physical injury to another person ---" Strike that, members of the jury. Do not consider the crime of manslaughter in the first degree at all. That is out of the case. Consider only the crime of manslaughter in the second degree which is defined as follows: "Section 125.15 of the Penal Law reads as follows: A person is guilty of manslaughter in the second degree when he recklessly causes the death of another person." You will note that there is quite a difference between the definition of murder which I have given to you and the definition of manslaughter in the second degree.

Robbery is defined in Section 160.00 of the same law as follows: "Robbery is forceable stealing." A person forceably steals property and commits robbery when in the course of committing a larceny he uses or threatens the immediate use of physical force upon another person for the purpose of (1) preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking. Or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Robbery in the first degree is defined in Section 160.15 of the same law as follows: "A person is guilty of robbery in the first degree when he forceably steals property and when in the course of the commission of the crime or of immediate flight therefrom he or another participant in the crime (1) causes serious physical injury to any person who is not a participant in the crime." In

this case, George Stafford. In that connection, I charge you, members of the jury, that causing the death of a person causes serious physical injury to that person.

Robbery in the second degree is referred to in the third count of the indictment and is defined in Section 160.10 of the same law as follows: "A person is guilty of robbery in the second degree when he forceably steals property and when: (1) He is aided by another person actually present."

Larceny is defined in Section 155.05 of the same law as follows: "A person steals property and commits larceny when with intent to deprive another of property or to appropriate the same to himself or to a third person he wrongfully takes, obtains or withholds such property from an owner thereof."

Grand larceny in the third degree is defined in Section 155.30 as follows: "A person is guilty of larceny in the third degree when he steals property and when --

subdivision 5, "The property regardless of its nature and value is taken from the person of another."

Section 20 under which both of these, each of these defendants is indicted reads as follows: "Section 20.00. When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, and acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."

If any of these crimes were jointly planned between the two defendants and jointly carried out with the knowledge of each of the defendants of what the other was doing, each defendant is liable for the acts of the other in committing the crime charged.

You have listened patiently to the testimony in this case and I am certain that it is probably fresher in your minds than it is in mine. Briefly, all of these offenses,

murder, robbery and larceny are alleged to have occurred about 10 or a little after 10 in the evening of December 30th, 1970 on East River Road somewhere in the vicinity of telephone poles numbered 215 and 216 and at a point at or near a place described as or referred to as being about a half mile from Bailey Road. You have heard the testimony of the different witnesses, the deputy sheriffs, the testimony as to the statements made by each defendant as to what he did and what he knew about the crime. You have heard the testimony as to all three of these men, the defendants and the third man, George Stafford, being present at the Nick and Corky's bar and leaving at or about the same time. You have heard the testimony of how Stafford wanted to get a ride to Canandaigua where he lived and that he finally prevailed upon, I think it was Kibbe, to use his car to transport him to Canandaigua. You have heard what transpired, the testimony as to what transpired. You have heard the testi-

mony to the effect that Krall drove the car after reaching or being in the vicinity of the Thruway, you have heard the testimony as to the direction of the driving. You have heard what occurred, the testimony as to what occurred at the time the car was stopped on East River Road. The testimony that the car was stopped near a gas station or a superette and other testimony that it was stopped some distance away in a vacant territory off the road. You have heard the testimony as to what occurred in the back seat of the car regarding the victim Stafford. You have heard the testimony regarding the different articles which have been testified to as being the property of George Stafford being found in the car. You have heard testimony as to how he exited, how George Stafford exited from the car or as to how he was caused to exit. What his condition of clothing was. What his condition of dress or undress. What the lighting conditions were. What the temperature being near zero was. The fact that

there was hard snow on the ground and
testimony that wind was blowing, putti
crust on the snow. You have heard the
testimony as to the death or running i
of George Stafford in the East River R
by an automobile -- truck or a light t
You have heard testimony that he was d
some distance under the truck or car t
hit him. You have heard testimony as
these different articles were obtained
how they were seen. You have heard te
as to what each defendant said or deni
doing regarding the whole incident. Y
heard the testimony of Mr. Krall that
no way, I think to the effect that he
no way knew that anything wrong was go
in the back seat of the car and that h
no intention to perform any illegal ac
far as the deceased George Stafford wa
concerned.

In that connection, by their plea
their respective pleas of not guilty,
defendant has denied any guilt whatev

of any of the crimes charged, and I repeat, each of these defendants appears before you presumed to be innocent.

Again, members of the jury, not by way of giving you an easy out or anything of the sort, I charge you, robbery in the third degree which you will consider only if you are unable to agree upon the counts of the indictment charging robbery in the first degree and robbery in the second degree and only if you feel that some robbery did in fact occur. Robbery in the third degree is defined in Section 160.05 of the Penal Law as follows: "A person is guilty of robbery in the third degree when he forceable steals property."

Take the case, members of the jury, first decide what the credible facts are and then apply to them the law which I have given to you. Use all of the evidence, every part of it in reaching your determination and decide on the evidence and on the law whether each of these defendants is

guilty or not guilty of each of the crimes charged.

According to law, juror No. 5 is the Foreman of the jury, and he is appointed as Foreman. Among other things he will consider the arguments advanced and see that they are considered in proper and logical form and will also report to the Court the verdict you have agreed upon.

This being a criminal case it is necessary that all 12 of you jurors first chosen agree upon a verdict before that can be announced as the verdict of the jury.

You will base your verdict upon the evidence, all of the evidence, and decide the case in accordance with the law and the evidence and be sure that whatever verdict you return it is free from passion, prejudice, sympathy, or any other improper motive.

Are there any requests or exceptions?

MR. CORNELIUS: The People have none, thank you, Your Honor.

MR. BEER: I have just two exceptions, Your Honor. First, I respectfully except to the Court charging the jury that the Defendant Krall's producing of a one hundred dollar bill was additional evidence or possible additional evidence that the crime charged had been committed.

And my second exception is the Court charging the jury on the robbery first degree that the inflicing serious physical injury includes causing the death of a person.

THE COURT: Any requests or exceptions, Mr. Crimi?

MR. CRIMI: I first respectfully except, that the indifference to human life means the indifference to the human life of George Stafford. I also join in the exceptions as to the serious physical injury as stated by Mr. Beer.

Also, Your Honor, I submitted some requests to charge.

THE COURT: I know you did. Well, I have read them. I think that I have covered

them. If not, make your request.

MR. CRIMI: Yes. Well, in relation to the offering in evidence of conversations, statements or declarations, Your Honor did cover most of it, but I don't think Your Honor mentioned the situation of the warnings to be clear and in understandable terms. That is the Miranda warnings.

THE COURT: I think I covered that by quoting from the statute. But certainly, the waiver has to be knowingly made, intelligently made and any confession can only be after giving warnings required by the constitution of New York State or the United States or the decided law of the Supreme Court. If they are to be considered.

MR. CRIMI: Thank you, Your Honor. Now, the other thing under Section 310 of the Criminal Procedure Law, it appears that I have to request ---

THE COURT: What do you request?

MR. CRIMI: I request that the Court state to the jury that the fact that the

Defendant Kibbe did not testify is not a factor from which any inference unfavorable to him may be drawn.

THE COURT: I so charge you, members of the jury. That can absolutely not be used in any way against the Defendant Kibbe. This is absolute legal right not to testify or to offer any evidence.

MR. CRIMI: Thank you.

THE COURT: I don't think that is Section 310, however. Anything else?

MR. CRIMI: Nothing Your Honor. Thank you.

THE COURT: You may swear the Court Attendants.

(Whereupon the Court Attendants were sworn by the Court Clerk.)

THE COURT: You may retire. The first 12 men who are in the jury and the other two will also retire to separate quarters and please do not discuss this case amongst yourselves.

(Whereupon the jury retired for deliberations at 4:50 P.M.)

(Whereupon the following transpired in the absence of the jury:)

THE COURT: Mr. Cornelius, do you

consent that the jury take and receive such exhibits as were received in evidence as they may request?

MR. CORNELIUS: Surely.

THE COURT: Do you, Mr. Beer?

MR. BEER: Yes, the Defendant Krall agrees to that, Your Honor.

THE COURT: And do you, Mr. Crimi?

MR. CRIMI: Yes, Your Honor.

THE COURT: Do you, Mr. Krall and Mr. Kibbe consent?

DEFENDANT KRALL: Yes.

THE COURT: Do you, Mr. Kibbe?

DEFENDANT: KIBBE: Yes.

THE COURT: All right.

(Whereupon Court recessed awaiting a verdict at 4:31 P.M.)

(Whereupon Court reconvened at 4:45 P.M. - defendants not present but by counsel.)

THE COURT: I did not think that it was necessary to have the defendants here because I think that this is a matter for the attorneys to handle. The request of the jury is three-fold. "Could we please have

all evidence used." That means exhibits, and that's all right. The second request is: "Along with the original transcript that was taken in the Sheriff's Office." Now, that is not in evidence. So, I will have to tell them they can't have that. They can have testimony read, though. The third request: "Also, we would like to have the indictment so we can go over this and get things clear for us." That is the very thing I thought about. There are four different counts, and while the indictment is not in evidence, I'm wondering if it would be in error to let them have a copy of it so that they will understand and can read the different counts.

MR. CRIMI: I think they probably should have the indictment although it's not in evidence.

THE COURT: It's not in evidence, but only for the purpose of reading and understanding the different counts. So far, of course, they're in the record, but it would mean that they would have to come out each

time and have the indictment read to them.

MR. CRIMI: I think we should give them a written list of the offenses.

THE COURT: That isn't what they want certainly, the murder charge is unusual and the robbery first charge is unusual and they want to see what words are used.

MR. BEER: I don't think it would be proper, Judge. I think I have read comments and opinions that the indictment not being in evidence cannot be used or taken into the jury room.

THE COURT: It's the only sensible way in which any jury could read the words of an unusual charge contained in the indictment.

MR. CORNELIUS: I was just wondering, Your Honor, suppose, since there is provision for submitting a written list, I'm wondering about Xeroxing that portion of the indictment which contains the four counts without the title.

THE COURT: Yes, an original list prepared by the Court containing the offenses.

MR. CRIMI: Well, let me say this, Your Honor, as far as I'm concerned, if Your Honor wants to give them the indictment I will not object to it if at the time it's delivered to them that you again repeat to them ---

THE COURT: I would intend and endeavor to properly instruct them that it is delivered only for their information and is no proof or evidence of guilt whatever.

MR. CRIMI: Yes. I don't see how they can remember all of those words.

THE COURT: Yes, they're unusual words used there.

MR. BEER: I will consent to it on that basis also, Your Honor.

THE COURT: Will you consent to it?

MR. CRIMI: Yes.

THE COURT: The defendants are here, but I think this is a matter ---

DEPUTY SHERIFF: I can get them in five minutes.

THE COURT: Well, maybe we better have

them.

DEPUTY SHERIFF: Yes, Your Honor.

THE COURT: Now, while we are waiting look it over with the indictment and see if it says the same thing. I think it does, it's a Xerox copy.

(Whereupon the defendants were brought into the courtroom at 5 o'clock P.M.)

(Whereupon a conference was held out of the hearing of the Court Reporter between counsel for the defendants and the defendants.)

THE COURT: Mr. Kibbe and Mr. Krall, the jury, among other requests has made the following: "Also we would like to have the indictment so we can go over this and get things clear to us." And, I propose to give them a Xerox copy of the indictment which has been read by your respective attorneys and compared to the original. Now, do either of you have any objection to that?

DEFENDANT KRALL: No.

THE COURT: Do you, Mr. Kibbe?

DEFENDANT KIBBE: No, Sir.

THE COURT: Do you, Mr. Crimi?

MR. CRIMI: No.

THE COURT: Or Mr. Beer?

MR. BEER: No, Your Honor.

THE COURT: Or Mr. Cornelius?

MR. CORNELIUS: No, Your Honor.

THE COURT: All right. Call the jury in.

(Whereupon the jury was brought back into the courtroom at 5:03 P.M. - jury present and polled - defendants present and polled and by counsel.)

THE CLERK: Members of the jury, have you agreed upon a verdict?

THE FOREMAN: No, we have not.

THE COURT: You may be seated. Members of the jury, I have from you the following communication: "Could we please have all evidence used." That means, the exhibits received in evidence; does it not?

THE FOREMAN: Yes.

THE COURT: Yes, you may have that. The second request: "Along with the original transcript that was taken in the Shefiff's

Office." I'm sorry, that you can't have. The transcript was not received in evidence. You may, if you wish, have the reporter read the questions asked and the answers given, but I cannot direct that you have the transcript. The third request: "Also, we would like to have the indictment so we can go over this and get things clear to us." I hand you a photostat copy of the indictment against Roy Krall and Warren Kibbe containing on the first and second page -- the second page is turned over this way, four counts. This copy of the indictment is given to you only so that you can see what words are used and the different counts and consider whether the evidence as you find it has met the burden of proof of which I have advised you.

Once again, I repeat, the returning of an indictment or the indictment itself is no evidence or proof whatever of the guilt of either of the defendants of any of the crimes charged and cannot and must not be

accepted by you or taken by you as any such proof. This copy of the indictment is being given to you with the consent of the defendants and their attorneys and the District Attorney, not as proof of anything, but only to let you know the wording of the indictment so that the accusations against these defendants may be clearly understood.

Is there any other cautionary advice that any of you counsel think should be given?

MR. CORNELIUS: No, Your Honor.

MR. BEER: No, Your Honor.

MR. CRIMI: None, Your Honor.

THE COURT: All right. Are there any other questions, members of the jury?

THE FOREMAN: No, Your Honor.

THE COURT: If not, you may retire.

(Whereupon the jury returned to deliberations at 5:08 P.M.)

(Whereupon Court reconvened at 9:15 P.M. - November 5, 1971 - defendants present and by counsel.)

THE COURT: Gentlemen, let the record indicate that the defendants and their counsel and the Assistant District Attorney are all

present. Gentlemen, one of the notes
received from the jury is as follows
quote:"We would like to be taken to t
in question on East River Road to see
ourselves where pole 215 is in regard
gas station." Now, I propose to tell
that they cannot be conducted to the
My authority for that is Section 270.
the Criminal Procedure Law which read
follows: "When the Court is of the o
that a viewing or observation by the
the premises or place where an offens
trial was allegedly committed or of a
premises or place involved in the cas
be helpful to the jury in determining
material factual issue, it may in its
cretion at any time before the commen
of the summations order that the jury
conducted to such premises or place f
purpose in accordance with the provis
this section." That apparently requi
any viewing of the premises be conduc
any time before the commencement of t

summations, and I intend to hold that it cannot be done now.

All right, bring the jury in.

(Whereupon the jury was brought into the courtroom at 9:20 P.M. - jury present and polled - defendants polled and present and by counsel.)

THE CLERT: Members of the jury, have you agreed upon a verdict?

THE FOREMAN: No, we have not, Your Honor.

THE COURT: Members of the jury, I have from you several communications, one reading as follows; and I quote: "We would like to be taken to the area in question on East River Road to see for ourselves where pole 215 is in regards to the gas station." My answer to that is as follows: According to Section 270.50 of the Criminal Procedure Law, and I quote from that section as follows, subdivision 1: "When the Court is of the opinion that a viewing or observation by the jury of the premises or place where an offense on trial was allegedly committed or of any

other premises or place involved in the case will be helpful to the jury in determining any material factual issue it may in its discretion at any time before the commencement of the summations order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this section."

Members of the jury, I cannot direct that you view the premises at this stage of the proceedings. The law specifically provides that any time before the commencement of the summations. The summations have not only been commenced, they have been finished and therefore that request must be and is denied.

I have another request from you which reads as follows: "If found guilty of first count are they automatically found guilty on the second count? Please clear this for us." The answer to that question is that they are not automatically found guilty of any count, either of the defendants. If your verdict based

upon the evidence and the law be one of guilty of the first count as to either or both defendants, that does not mean and I emphasize, not, automatically mean or mean in any case that the defendants are found guilty of the other counts. Each count is a separate accusation and your verdict must be guilty or not guilty depending upon the evidence as to each count. Nothing is automatic. You may find one defendant guilty of one count and not guilty of another. Just by way of illustration so that your verdict, your finding of guilt on one count or the first count, to answer your question again, does not automatically mean that that defendant or those defendants are guilty on all counts. Do I make myself clear?

(Whereupon the jurors nodded in the affirmative.)

THE COURT: Now, the other question is as follows: "Please explain all four counts again so that they will be clear to us and the laws that pertain to them."

The first count of the indictment naming

Roy Krall and Barry Kibbe as defendants accuse each of them of a violation of Sections 20.00 and 125.25 of the Penal Law,namely that of murder and of criminal liability for the conduct of another. Now, as far as Section 20.00, I quote that to you as follows: "When one person engages in conduct which constitutes an offense another person is criminally liable for such conduct when acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes or intentionally aids such person to engage in such conduct." That is the section of the law under which each defendant is accused of being guilty of the wrongful acts of the other. Whether either defendant is guilty depends entirely upon the facts and the application of the law to them. First, you will note that a person who does not actually commit the act must act with the mental culpability required for the commission of the wrongful act, and he must solicit, request, command, importune or intentionally

aid such person who commits the act to engage in such conduct. That is Section 20 as it's called.

Section 125.25, sub. 2 accuses these defendants, and each of them of the crime of murder. The section reads as follows: "A person is guilty of murder when under circumstances evincing a depraved indifference to human life he recklessly engages in conduct which creates a grave of death to another person and thereby causes the death of another person." All of those factors must coincide to render a person guilty of murder under that section. By the application of Section 20 the People accuse the other defendant of intentionally aiding and having the mental culpability required for the commission of the crime.

The second count accuses each of the defendants, both under that section 20 which I have tried to explain to you and which I read to you, and under Section 160.15, sub. 1 of the Penal Law which reads as follows:

"Robbery in the first degree. A person is guilty of robbery in the first degree when he forceably steals property and when in the course of the commission of the crime or of immediate flight therefrom he or another participant in the crime causes serious physical injury to any person who is not a participant in the crime."

The third count accuses each of the defendants under Section 20.00 which in simple language makes one liable for the acts of the other if he has the mental culpability required for the commission of the crime.

The third count accuses each of these defendants of the crime of robbery in the second degree which is defined in Section 160.10 of the Penal Law as follows: "A person is guilty of robbery in the second degree when he forceably steals property and when he is aided by another person actually present."

And in the fourth count, each of the defendants are accused through the operation of Section 20.00 of the crime of grand larceny

in the third degree which is defined as follows: "A person is guilty of grand larceny in the third degree when he steals property and when the property, regardless of its nature and value is taken from the person of another."

Evidence or testimony has been presented from which you may find that one or more of these crimes have been committed. If you find in accordance with Section 20.00 that the actor, the person who performed the act was solicited to perform the act, requested to perform it, commanded, importuned or intentionally aided by the other defendant who himself was acting with the mental culpability required for the commission of that wrongful act, then that is sufficient under the law as I have given it to you to render each liable of the particular offense committed.

I have endeavored to make myself clear. I'm not sure whether I have. If you have any questions I'd appreciate your asking them. Juror No. 2.

THE JUROR: Your Honor, would you clarify the phrase "Immediate flight therefrom?"

THE COURT: Immediate means at the present, that is, not something in the distant past. In the present; at once; without delay; not deferred by any interval of time. The phrase depends upon the facts as found. There is no hard and fast definition of immediate flight. I can only say that it does not refer to flight that occurred at an appreciable length of time after the event and that whatever was done after had nothing to do with the wrongful act or the act perpetrated at the time. It must be close in time. It must refer or be connected with the perpetration of the act itself. Immediate flight does not mean some flight that occurred after an appreciable length of time. A person has to commit the act and then immediately, right away, presently, flee from it. Does that explain it to you?

THE JUROR: Yes, Sir.

THE COURT: In other words, if it

happened several hours or several days later it would not be immediate flight therefrom. Flight, of course, means to go away from. It's fleeing from. I think flight is clearly understood.

Now, first of all I explained the four counts of the indictments so that they are understood by each of you members of the jury.

(Whereupon the jurors nodded their heads in the affirmative.)

THE COURT: Now, I also have a message from you: "What about our cars as to where they are parked?" I can only tell you, members of the jury, that if you are, any of you, unfortunate to get parking tickets while engaged in the deliberations in this case we, or I, will take care of them without expense to you. I can't say more than that, but don't worry about it. I would suggest, however, that you cause your car, if they are in any public place to be locked, and for that purpose the attendants will be glad to oblige.

I have received one further request for information from you. I quote as follows:

CERTIFICATE OF SERVICE

Nov 10, 1975

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Linda Grobey